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Supreme Court, U.S.
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No. 87-1537

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1987

Mary Elaine Crowley,
Petitioner

v.

N.H. Personnel Commission,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF NEW HAMPSHIRE

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

On appeal from a post-termination state administrative agency hearing upholding the discharge of a state employee for willful insubordination, did the New Hampshire Supreme Court err by not vacating the agency decision for the alleged due process violation of excluding certain documents from evidence, when the record on appeal fails to demonstrate: (1) that the documents were ever offered into evidence; (2) that the employee objected to the documents not being entered into evidence during the agency hearing; (3) that the employee made any offer of proof as to the contents of the documents; and (4) that the employee ever demonstrated any material prejudice resulting from the alleged exclusion of the documents?

LIST OF PARTIES

The parties to the proceedings below were the petitioner, Mary Elaine Crowley, and the New Hampshire Sweepstakes Commission (her employer).

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28 U.S.C. §1257 5
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JURISDICTION

This Court is without jurisdiction under 28 U.S.C. §1254(1), as the decision below was not from the courts of appeals. However, this Court may have jurisdiction under 28 U.S.C. §1257.

The respondent, New Hampshire Personnel Commission, respectfully requests that this Honorable Court deny the petition for writ of certiorari, seeking review of an unreported decision of the New Hampshire Supreme Court.

STATEMENT OF THE CASE

Petitioner, Mary Elaine Crowley, worked as a bingo inspector for the New Hampshire Sweepstakes Commission ("Commission") from September, 1981 until November 12, 1985, when she was discharged. Her duties included monitoring bingo games to ensure compliance with applicable laws and regulations. Petitioner had access to confidential Commission files and reports. The Commission's Executive Director, George Jones, received a number of telephone calls from people outside of the Commission, all of whom indicated that they had been in contact with the petitioner and some of whom had knowledge of confidential information. In response to these calls, as well as in response to other events, the

petitioner was informed on several occasions of the need for, and the importance of, maintaining the confidentiality of Commission files and information.

As one step in regaining control over Commission records, Mr. Jones issued an intra-department communication dated April 18, 1985, requiring that all copies of Bingo and Lucky 7 files and information being kept outside the Commission offices be brought back to the premises. Although the petitioner was aware of this directive, she had three such documents at her home which she failed to return to Commission offices.

On October 28, 1985, petitioner's new supervisor asked her if she had ever done an audit of a particular

organization. Petitioner stated that she had not. Later that day, petitioner called her supervisor to report that she had gone through her records at home and found certain papers from the Commission's former director stating that he would do the audits of the organization in question. Upon examination of those papers, petitioner's supervisor determined that they were copies of Commission records concerning Bingo and Lucky 7 investigations. Thus, they were records that were required to have been returned to Commission offices under the terms of the April 18, 1985 directive. As a result of her failure to comply with the April 18th directive, the petitioner was discharged for willful insubordination. Her discharge notice stated that

petitioner must immediately return any other Bingo and Lucky 7 information that she was keeping outside of the office.

Petitioner appealed her termination to the New Hampshire Personnel Commission. A hearing was held on January 20, 1986. At that hearing, the petitioner admitted keeping the three documents in question at her home, but claimed she had forgotten that she had them. She testified both that she thought the papers were important and that she had kept them stored under her mattress (the record does not reveal when the documents were placed under her mattress). Petitioner testified that she never had any intention of using those papers for any purpose of self-preservation. She further testified, however, that she "could not

have given those papers to [the former acting director of the Commission]."

At the hearing, petitioner was in possession of copies of the three documents in question (despite the fact that her discharge order had required her to return any Bingo and Lucky 7 information that she was keeping outside the Commission offices). When petitioner's attorney showed the documents to a witness, the State requested that the Personnel Commission go into executive session to argue whether the documents were confidential. An executive session was then held. As the record reflects, the Personnel Commission indicated that the executive session would not be tape-recorded (Petition for Writ of Certiorari at 14a), and the record

contains no objection by any party to that procedure. Following the unrecorded executive session, the hearing continued. Petitioner's attorney proceeded to cross-examine petitioner's supervisor regarding the three documents. Nowhere does the transcript reflect that petitioner offered the documents into evidence, or that the Personnel Commission excluded the documents over objection. Nor does the transcript show that the Personnel Commission prohibited petitioner from asking questions of witnesses regarding the documents. The transcript reflects no offer of proof by the petitioner regarding the contents of the documents.

The Personnel Commission upheld petitioner's discharge, and denied her request for reconsideration.

Petitioner appealed to the New Hampshire Supreme Court, raising as one issue on appeal that the Personnel Commission denied her due process when it prevented her from introducing evidence vital to her case, i.e., the three documents in question. In her brief, petitioner conceded that her state employment is not "property under New Hampshire law," and that her "state job is not protected as property under the 14th Amendment ... ." Appellant's Brief at 25, 28. Instead, petitioner argued that her employment "is a personal liberty requiring protection." Id. at 28.

In response, the State did not argue whether or not petitioner was entitled to due process protection. The State first argued that petitioner

failed to preserve for appeal any issue as to the Personnel Commission's alleged refusal to permit the introduction of, or cross-examination about, the three documents in question. The State next argued that the petitioner in fact did cross-examine her supervisor about the documents. The State finally argued that even assuming that the Personnel Commission erred, petitioner failed to demonstrate any material prejudice resulting therefrom. State's Brief at 25-30.

After full briefing and oral argument, the New Hampshire Supreme Court concluded that disposition of this case did not require a formal written opinion, and affirmed. Petitioner's motion for reconsideration was denied. Petitioner thereafter filed her petition for a writ of certiorari in this Court.

REASONS FOR DENYING THE WRIT

I. ADEQUATE AND INDEPENDENT STATE GROUNDS EXIST TO SUPPORT THE DECISION BELOW.

In her petition for a writ of certiorari, petitioner's single "question presented" is whether due process prevents a state administrative agency from refusing to allow petitioner to introduce, or cross-examine certain witnesses about, three documents. That issue was not properly preserved for appeal to the New Hampshire Supreme Court. As the State argued in its brief to the New Hampshire Supreme Court, it was petitioner's burden under state law to ensure that all objections appear as a matter of record in order to be considered by the State Supreme Court. See Brewster v. State, 107 N.H. 226,

227, 219 A.2d 706, 707 (1966); Glynn v. N.H. Personnel Commission, 116 N.H. 810, 813, 372 A.2d 1303, 1305 (1976). The record does not demonstrate that the three documents in question were offered into evidence, that they were excluded from evidence by the Personnel Commission, that any objection or offer of proof concerning the documents was made by petitioner to the Personnel Commission, or that petitioner was prohibited from asking any witness any questions about the documents. Under those circumstances, petitioner failed to preserve any issue for appeal; no abuse of discretion by the Personnel Commission could be found as a matter of state law. See Brown v. Cathay Island, Inc., 125 N.H. 112, 115-16, 480 A.2d 43, 44-45 (1984); Sklar Realty, Inc. v.

Town of Merrimack, 125 N.H. 321, 328, 480 A.2d 149, 153 (1984). "Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in the United States Supreme Court, as long as the State has a legitimate interest in enforcing its procedural rule." Michigan v. Tyler, 436 U.S. 499, 512 n. 7 (1978). Accordingly, this Court should deny the petition for a writ of certiorari.

II. NO ISSUE CONCERNING PETITIONEP'S ALLEGED PROPERTY INTEREST IN HER STATE EMPLOYMENT WAS RAISED OR ARGUED BELOW.

As her first reason for granting a writ of certiorari, petitioner contends that "[a] long line of appellants to the

New Hampshire Supreme Court, including petitioner, have sought without success to assert that a classified state employee has a property interest in his or her state employment, entitled to the protection afforded by the Fourteenth Amendment." Petition for a Writ of Certiorari at 7. In fact, however, petitioner did not raise this issue below. As discussed above, petitioner conceded in her brief filed in the New Hampshire Supreme Court that her state job is not protected as property under the 14th Amendment. Petitioner's Brief at 28. Thus, this issue is being raised for the first time in this Court.

Of equal importance is the fact that the issue of whether due process protections applied to the Personnel Commission hearing simply was not

involved in the decision of this case. Neither before the Personnel Commission nor before the New Hampshire Supreme Court did the State argue that due process protections were or were not applicable. Instead, the State argued that the specific evidentiary challenges made by petitioner were not preserved for appeal, that the petitioner in fact did cross-examine her supervisor concerning the documents in question, and that even assuming error, petitioner failed to show material prejudice. Thus, no contested issue concerning the applicability of due process was presented to the New Hampshire Supreme Court for decision.

Finally, the State Supreme Court's decision does not hold that petitioner was not entitled to due process. The

court found it unnecessary to write a formal written opinion, there being no abuse of discretion nor error of law. The court cited Desmarais v. State Personnel Commission, 117 N.H. 582, 586, 378 A.2d 1361, 1363 (1977). Although petitioner treats this citation as evidence that the court decided the unargued due process/property right issue, an examination of 117 N.H. at 586, the page cited by the court, reveals that it was cited for the unexceptional propositions that an appellate court does not sit as a trier of fact, and that administrative findings of fact are entitled to great weight and cannot be set aside lightly. That citation is consistent with the main issue argued on appeal below, i.e., whether the evidence supported the

Personnel Commission's finding that the petitioner's failure to return the three documents was willful.

Although Desmarais also discusses whether public employment is a protected property right, that discussion occurs in 117 N.H. at 588-89. These pages were not cited below. Thus, there is simply no reason to believe that any issue of due process protection was involved in the New Hampshire Supreme Court's decision.

Ordinarily, the United States Supreme Court does not decide questions not raised or involved in the lower court. Youakim v. Miller, 425 U.S. 231, 234 (1976). This Court should therefore decline to decide the question presented in this petition.

III. THE ISSUES PRESENTED ARE NOT IMPORTANT ENOUGH TO WARRANT REVIEW.

As demonstrated above, the New Hampshire Supreme Court was not presented with a contested issue involving the application of due process protections to public employment. Instead, it was faced with deciding whether an alleged objection to an alleged exclusion of evidence was properly presented as an issue for appeal, and if so, whether the alleged exclusion was erroneous and materially prejudicial. Such routine issues do not warrant review by this Court.

CONCLUSION

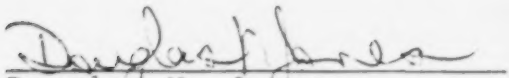
For all of the above-stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

N.H. PERSONNEL COMMISSION

By its attorneys,

Stephen E. Merrill
Attorney General



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March 31, 1988

I hereby certify that three copies of the foregoing was mailed this day, postage prepaid, to W. Michael Dunn, Esquire, 1000 Elm Street, Manchester, N.H. 03101, counsel of record.

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